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Amicus Brief in *Hedberg and Hedberg, M.D. v. Wakamatsu, M.D.*

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 12624

LESLIE HEDBERG AND PETER HEDBERG, M.D.,

Appellants

v.

MAY WAKAMATSU, M.D.,

Appellee

ON APPEAL FROM A FINAL JUDGMENT OF THE

SUFFOLK COUNTY SUPERIOR COURT

BRIEF FOR AMICUS CURIAE PROFESSOR MARK S. BRODIN, ESQ. NICKOLAS I. MERRILL

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

Mark S. Brodin, Esq., is a member of the Massachusetts Bar. He is a Professor of Law and the Michael & Helen Lee Distinguished Scholar at Boston College Law School, Newton, Massachusetts, where he teaches in the fields of Civil Procedure and Evidence. He has co-authored the Handbook of Massachusetts Evidence since 1994 (annual editions) and served as Editorial Consultant on the six-volume treatise, Weinstein's Federal Evidence. Nicholas I. Merrill is a student at Boston College Law School studying in its Amicus Curiae Practicum, a course designed to allow faculty and students, as friends of the court, to submit Amicus Briefs that may assist courts in resolving important legal issues of the day.

Amici have academic and professional interests in the development of the law of Evidence in the Commonwealth, and submit their brief in response to the Court’s solicitation of amicus briefs in this case. The views expressed are their own. Amici represent no institution, group or association and have no economic interest in the outcome of the case. No party paid for or participated in the writing and filing of this brief.

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ISSUE PRESENTED

The Court's request for Amicus Briefs embraced multiple issues. Amici address only so much of the request as asks whether under Massachusetts law, in a civil case, a witness who testifies to a lack of memory of the subject matter is "unavailable" for purposes of the hearsay rule, thus opening the door to admission in evidence of prior statements against pecuniary interest by the witness. Amici do not address whether the statements would have been admissible or excludable under any other evidentiary rules or Agency principles.

STATEMENT OF FACTS

The facts are more fully discussed in the briefs of the parties. We briefly summarize here the essential facts bearing on the evidentiary issues of witness unavailability due to loss of memory and the admissibility of the witness's statements against pecuniary interest, raised at R.A. II 110–111.

This is a personal injury, medical malpractice suit by a patient and her husband (the Hedbergs) against the doctor (Wakamatsu) who performed surgery on the patient. Record Appendix ("R.A.") I at 11–14. On appeal from a jury verdict for the doctor, the

patient seeks reversal and remand for new trial on the grounds that the trial judge erred in excluding critical evidence at trial bearing on the negligence of the doctor. R.A. II at 264; Brief of Plaintiffs-Appellants at 47. This Court took the case from the Appeals Court and requested amicus briefs.

The surgical procedure required that the patient's legs be positioned in a certain way on stirrups; allegedly, permanent sciatic nerve damage suffered by the patient was caused by the doctor's negligence in positioning her legs or negligence in failing to make sure that no member of the surgical team leaned against her leg during the surgery. Id. at 13. The team included a resident who stood next to the patient's right leg and a medical student who stood next to the patient's left leg. Id. at 70; R.A. II at 15.

A day after surgery, the medical student (Dr. Stephen) spoke with the patient (Mrs. Hedberg) in the hospital; he made notes in her chart documenting severe pain from sciatic nerve injury and mentioning the positioning of the leg. R.A. I at 209, 216. According to Mrs. Hedberg, he also stated that they had difficulty positioning her leg and he may have

leaned against her leg during the surgery. R.A. II at 44–46.

In a pre-trial deposition and in trial testimony by video deposition, Dr. Stephen did not deny making the statement; rather he simply testified he did not recall making the statement. R.A I at 30–31, 34; R.A. II at 44–46. Additionally, Dr. Stephen testified that he did not recall any event or conversation involving Mrs. Hedberg. R.A. I at 23–34. Dr. Stephen did not even remember Mrs. Hedberg. Id. at 24. Dr. Stephen did not remember anything from Mrs. Hedberg's surgery. Id. at 25. Dr. Stephen did not remember the positioning of Mrs. Hedberg's legs during the surgery. Id. Dr. Stephen did not remember where he was standing during the surgery or whether he was holding retractors during the surgery. Id. at 26. Furthermore, refreshing Dr. Stephen's memory with Dr. Wakamatsu's testimony [essentially that the team did nothing wrong] was unsuccessful, and Dr. Stephen still did not remember the surgery. Id. Dr. Stephen did not remember treating Mrs. Hedberg after the surgery on May 17 or 18. Id. at 28. Dr. Stephen did not remember discussing Mrs. Hedberg's pain or surgery positioning or writing his observations in Mrs. Hedberg's medical record. Id. at

30. Dr. Stephen did not remember apologizing to Mrs. Hedberg and informing her that he may have been leaning against her leg while holding retractors. Id. at 30-31.

The trial judge excluded the prior statements. She found that Dr. Stephen's lack of memory of the events in question was genuine. R.A. II at 153. She also questioned whether Mrs. Hedberg's recollection of his statements was reliable. R.A. II at 154-155. The ruling is at R.A. II 151-155.[1]

[1] The judge's finding of genuine memory loss was apparently made based on criminal cases that permit the admission of prior inconsistent statements when a claim of memory loss is feigned. Id. at 152-153. Amici do not address whether the evidence supports her finding because, as we argue *infra*, in civil cases a witness who testifies to a loss of memory is unavailable for purposes of the exception for statements against pecuniary interest, irrespective of whether the memory loss is genuine or feigned.

ARGUMENT

I. THE COURT SHOULD HOLD THAT UNDER THE COMMON LAW OF MASSACHUSETTS A WITNESS WHO TESTIFIES IN A CIVIL CASE TO LOSS OF MEMORY OF THE EVENTS ON TRIAL IS UNAVAILABLE FOR PURPOSES OF THE HEARSAY RULE.

Introduction

The Court should hold that the witness was unavailable by virtue of his loss of memory, a legal conclusion supported by the weight of opinion of evidence scholars and the common law decisions of innumerable courts. This rule was also recommended by the distinguished advisory committee that drafted the Proposed Massachusetts Rules of Evidence. Addendum A. The rule was adopted in the Federal Rules of Evidence by the Supreme Court and Congress (Addendum B) and by the multitude of state legislatures and courts that follow the federal rules. As all of these authorities recognize, sound policy considerations support holding that a witness who testifies to loss of memory of the subject matter is unavailable for purposes of the hearsay rule. It is time for the Supreme Judicial Court to incorporate this principle into the common law of evidence in Massachusetts.

A. Under The Prevailing Modern View of Evidence Scholars and Common Law Courts, A Witness Who Testifies to A Loss of Memory of the Subject Matter of Prior Statements Is "Unavailable" for Purposes of the Hearsay Rule.

During the Twentieth Century, the Hearsay Rule underwent substantial change as additional exceptions were recognized and existing exceptions were broadened. Change was particularly evident in the area of exceptions permitting the introduction of out of court statements when a witness is unavailable. [2] Originally, declarant unavailability was "strictly construed" to encompass only dead declarants. *Commonwealth v. Tobin*, 160 Mass. 156 (1893); Paul J. Liacos, Handbook of Massachusetts Evidence 324 (5th ed. 1981); 2 Morgan, Basic Problems of Evidence 322-323. The common law evolved to construe declarant unavailability more broadly, resulting in wider admissibility of probative hearsay. Liacos, Handbook of Massachusetts Evidence 324; see *Commonwealth v. DiPietro*, 373 Mass. 369 (1977) (satisfying declarant

[2] Massachusetts was a pioneer in this movement and was hailed by evidence scholars for its statute (drafted by James Bradley Thayer) on declarations of deceased persons, and cases interpreting it. See McCormick's Handbook of the Law of Evidence §340 at 630-631 (1954); 2 Edmund Morgan, Basic Problems of Evidence 322-324 (1954).

unavailability through spousal privilege). The focus of the analysis changed from the unavailability of *the declarant* to the unavailability of the declarant's *testimony*.

Valuable evidence is lost when witnesses are unavailable, and the recurring situation of forgetful witnesses is a prominent example of the problem. See Mark S. Brodin & Michael Avery, Handbook of Massachusetts Evidence §8.17 at 676 (2019). A witness who professes lack of memory concerning the subject matter of the statement has rendered his live testimony in that regard unavailable. See id. at 677; Weinstein's Evidence Manual §17.01[2] (8th ed.). The expansion of what constitutes witness unavailability was driven by the practical desire to admit probative evidence that would otherwise be lost or kept secret under the traditional unavailability standard. See Liacos, Handbook of Massachusetts Evidence 324; 2 Morgan, Basic Problems of Evidence 322-323.

As the mid-to-late twentieth century push for codification of the law of Evidence gained traction, therefore, the virtually unanimous view of evidence scholars (as well as more recent common law decisions) defined unavailability for purposes of the hearsay

rule to include a declarant who testifies to a lack of memory of the subject matter of his statement. See McCormick's Handbook of the Law of Evidence §253 at 755 (Edward W. Cleary 3rd ed. 1984); Liacos, Handbook of Massachusetts Evidence 324; McCormick's Handbook of the Law of Evidence §280 at 678-679 (Edward W. Cleary 2d. ed. 1972); 2 Morgan, Basic Problems of Evidence 325. Not surprisingly, that view strongly influenced codification proposals. *See, e.g.,* Model Code of Evidence R. 503 (1942); Uniform Rules of Evidence R. 804 (1974).

B. The Proposed Massachusetts Rules of Evidence and the Federal Rules of Evidence Define Unavailability to Include A Declarant Who Testifies to A Lack of Memory of The Subject Matter of His Statements.

Among those who endorsed the view that loss of memory renders a witness unavailable for purposes of the hearsay rule were the distinguished Advisory Committee and members of the Massachusetts Bar who drafted and endorsed the Proposed Massachusetts Rules of Evidence submitted to this Court in 1980. Those rules would have expanded "unavailability" to include a declarant who "testifies to a lack of memory of the subject matter of his statement." Proposed Mass. R. Evid. 804(a)(3) (Addendum A). *See* 20 Hon. William G.

Young et al., Massachusetts Practice Evidence Series App. D at Advisory Committee's Note § 804(a) (3d. ed. 2018); Brodin & Avery, Handbook of Massachusetts Evidence §8.17 at 676; Liacos, Handbook of Massachusetts Evidence 324-325.

At that time, the Supreme Judicial Court declined to adopt the Proposed Rules in toto, fearing that to do so would "restrict the development of common law principles pertaining to the admissibility of evidence." See Announcement Concerning the Proposed Massachusetts Rules of Evidence (Dec. 30, 1982) (reprinted in 20 Young, Massachusetts Practice Evidence Series App. D at Order).

But the Court recognized the "substantial value" of the proposed rules and invited parties to cite them in briefs when advocating for changes in existing Massachusetts evidence law. See id. Since then, the Court has incorporated a number of those provisions into the common law of Massachusetts. See Brodin & Avery, Handbook of Massachusetts Evidence §1.1 at 2; Jeremiah F. Healy III, Ten Years After: A Reconsideration of the Codification of Evidence Law in Massachusetts, 15 W. New Eng. L. Rev. 1 (1993) (documenting early adoptions).

The case at bar presents an apt vehicle for the Court to adopt the substance of Proposed Mass. R. Evid. 804(a)(3) (and the corresponding definition of unavailability in Fed. R. Evid. 804(a)(3)) as the common law of Massachusetts. They define unavailability to include a declarant who "testifies to a lack of memory of the subject matter of his statement." Brodin & Avery, Handbook of Massachusetts Evidence §8.17 at 676; 20 Young, Massachusetts Practice Evidence Series App. D at § 804(a)(3). Each is designed to deal with the "recurrent evidentiary problem . . . [of] witness forgetfulness of an underlying event." Owens, 484 U.S. at 562; see Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 320, 322 (1972); Jack B. Weinstein, Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates §804.02 at 804-6–804-7 (J.M. McLaughlin ed., 2d. ed. 1997).

A majority of states have adopted Fed. R. Evid. 804(a)(3) verbatim or with slight textual variations. See 5 Jones on Evidence § 36.4 (Clifford S. Fishman & Anne T. McKenna eds., 7th ed. 2017). The rule requires a judge to determine that a declarant has "no memory of the events to which his hearsay statements relate"

from the declarant's own testimony. *N. Miss. Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986); *see Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013); *Schindler v. Seiler*, 474 F.3d 1008 (7th Cir. 2007); *Bail Bonds by Marvin Nelson, Inc. v. Comm'r of the IRS*, 820 F.2d 1543 (9th Cir. 1987); *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982). The decades-long use of Fed. R. Evid. 804(a)(3) across dozens of jurisdictions provides a track record of the value and workability of the rule.

By statute in Massachusetts, a claimed lack of memory is already a recognized basis for unavailability of child abuse victims in certain civil actions. G.L. c. 233, §82(b)(3); *see Adoption of Quentin*, 424 Mass. 882 (1997); *see generally* Brodin & Avery, Handbook of Massachusetts Evidence §8.24.1 at 696–700.

C. A Witness Who Testifies to Loss of Memory, Genuine or Feigned, is Unavailable for Purposes of the Hearsay Rule.

The Superior Court found the witness's lack of memory to be genuine, not feigned, and declined to admit his prior statements against pecuniary interest, citing criminal cases involving the hearsay exception

for prior inconsistent statements. R.A. II at 152–153. This was error. It is the position of the amici that the distinction between feigned and sincere lack of memory has no place in civil cases.[3]

It is true that the Court has held that prior witness testimony under oath before the grand jury or other formal proceeding is admissible for all probative purposes when the witness later feigns a lack of memory regarding the subject matter of the testimony at trial. *Commonwealth v. DePina*, 476 Mass. 614, 620–621 (2017); *Commonwealth v. Daye*, 393 Mass. 55, 71 (1984); *Commonwealth v. Sineiro*, 432 Mass. 735, 740 (2000); *Commonwealth v. Newman*, 69 Mass. App. Ct. 495 (2007). The Court noted that "a fact finder should be permitted to prefer a [prior inconsistent] statement made closer in time to the events at issue over contradictory trial testimony that the passage of time and intervening influences may have affected."

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[3] Amici do not address the matter of criminal cases, where Confrontation Clause rights are implicated. Massachusetts common law will guide courts when Confrontation issues arise under the Massachusetts Declaration of Rights. *See Commonwealth v. Caruso*, 476 Mass. 275, 295 n.15 (2017); *Opinion of the Justices to the Senate*, 406 Mass. 1201, 1211 (1989); *see generally* Brodin & Avery, Handbook of Massachusetts Evidence §8.24.2 at 596–606.

Daye, 393 Mass. at 71. Such a rule had already been adopted in almost half of the states and had fared well in practice. at 69–71.

The trial judges in those criminal cases had made findings that the memory loss was feigned. Feigning had been seen in the cases as a prerequisite to finding the prior statement to be inconsistent. *DePina*, 476 Mass. at 620–621; *Sineiro*, 432 Mass. at 739–740. And confrontation clause concerns rather than hearsay principles seem to have influenced those criminal cases.[4]

But it is the loss of probative evidence that drives Proposed Mass. R. Evid. 804(a)(3) and its federal counterpart, and that loss of evidence is just as problematic in a case of *genuine* memory loss as it is in a case of *feigned* loss. Neither Proposed Mass. R. Evid. 804(a)(3) nor Fed. R. Evid. 804(a)(3) draws

[4] Massachusetts common law will guide lower courts when Confrontation issues arise under the Massachusetts Declaration of Rights. See Caruso, 476 Mass. at 295 n.15; Opinion of the Justices to the Senate, 406 Mass. at 1211; see generally Brodin & Avery, Handbook of Massachusetts Evidence §8.24.2 at 596–606. Fed. R. Evid. 804(a)(3) satisfies the federal Confrontation requirement because of the witness' subjection to cross-examination. Owens, 484 U.S. at 563–564.

such a distinction in determining unavailability,[5] nor should the consequences of unavailability depend on the trial judge's ability to look into the mind of a witness to discern the cause of memory failure. Accordingly, the Court should hold that under Massachusetts law, in civil cases, a witness who testifies to loss of memory, whether genuine or feigned, is unavailable for purposes of the hearsay rule.

Conclusion

The medical student in the case at bar claimed a total lack of memory about the patient, the surgery, and post-operative care, as well as about his making any prior statement. R.A. I at 24–32. Sound policy and the overwhelming weight of authority compel the conclusion that he was "unavailable" for purposes of the hearsay rule under Massachusetts law, and this Court should so declare.

[5] Nor did the U.S. Supreme Court base its decision admitting the prior statement of the witness in *Owens* on any finding the memory loss was feigned. Indeed, the facts clearly suggest it was genuine. *United States v. Owens*, 484 U.S. 554, 556 (1988).

II. DR. STEPHEN'S PREVIOUS STATEMENTS WERE AGAINST HIS PECUNIARY INTERESTS AND SHOULD HAVE BEEN ADMITTED.

A. Dr. Stephen's Statements were Against His Pecuniary Interest.

Dr. Stephen's prior statements to Mrs. Hedberg should have been admitted as statements against pecuniary interest because they clearly had the tendency to expose him to civil liability. See *Commonwealth v. Carr*, 373 Mass. 617, 622–624 (1977); *N. Miss. Commc'ns, Inc.*, 792 F.2d at 1336–1337.

Before making his statement, Dr. Stephen was aware that Mrs. Hedberg's injuries were consistent with improper positioning during surgery and/or someone leaning against her leg during the procedure. R.A. I at 209. Dr. Stephen was also aware of the critical importance of proper positioning from Dr. Wakamatsu's instructions prior to surgery. R.A. II at 23–25. His statements to Mrs. Hedberg were an attempt to explain a potential cause of her pain. R.A. II at 44–46. This statement had a tendency to expose Dr. Stephen to civil liability because it inherently identifies his actions as the cause of Mrs. Hedberg's injuries, and was therefore admissible. See *Commonwealth v. Charles*, 428 Mass. 672, 679 (1999);

Mass. G. Evid. § 804(b)(3). A reasonable person in that situation would not have made the statement unless believing it to be true.

B. The Judge Erred by Intruding on the Jury's Role in Assessing the Credibility of Testimony.

In excluding the evidence, the trial judge stated her belief that there were "no indicia of reliability" to Mrs. Hedberg's testimony about the statement (R.A. II at 154-155). The indicia of reliability of statements against pecuniary interest inheres in the premise that declarants do not usually make such admissions unless they are true.[6]

In finding that Mrs. Hedberg's testimony concerning the statements was not reliable, the trial judge erred. The credibility of Mrs. Hedberg's testimony as to Dr. Stephen's prior statements is not

[6] Contrast statements against penal interest, which require "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." Mass. G. Evid. § 804(b)(3); see *Carr*, 373 Mass. at 622-624 (additional indicia of reliability safeguard only applicable to statements against penal interest since the dangers posed by those statements are far greater than the dangers posed by statements against pecuniary interest).

a predicate to admissibility and was not a decision for the judge to make. *See Commonwealth v. Drew*, 397 Mass. 65 at 76 (1986) ("The jury, rather than the judge, should evaluate the credibility of the witness."); *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 13 (1998); Mass. G. Evid. § 104(e).

It is axiomatic that the trial judge's obligation to rule on admissibility is "not a license for the trial judge to usurp the jury's function. If proffered evidence rests on a proper foundation, trial judges do not have the authority to exclude evidence because they do not believe it." Weinstein's Federal Evidence § 104.02[2].

CONCLUSION

For the foregoing reasons, the Court should hold that the statements of Dr. Stephen were admissible as statements against pecuniary interest of an unavailable declarant.

Respectfully submitted,

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Evidence

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Upon a divided vote of the Advisory Committee, this exception is not adopted.

This so-called "innominate exception", Commonwealth v. White, 370 Mass. 703, 713–714, 352 N.E.2d 904 (1976), is highly controversial. Of the several states that to date have enacted codes of evidence modeled after the Federal Rules of Evidence, approximately one third have omitted this exception.

In view of the common law power of courts to fashion new exceptions to the hearsay rule, *see id.* at 1934–1935; Commonwealth v. Carr, 373 Mass. 617, 369 N.E.2d 970 (1977), this exception is essentially unnecessary, and may provoke more problems than it is intended to solve. The Committee believes that recognition of new exceptions is best left to case law development.

The Federal Rule is printed here for convenience.

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a

deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or for unlawful procurement of an abortion or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Declaration of a deceased person. In a civil action or proceeding, a declaration of a deceased person, if the court finds that it was made in good faith and upon personal knowledge of the declarant.

Advisory Committee's Note

(a) "The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b)." Fed.R.Evid. 804(a), Adv.Comm.Note. This subdivision is identical to the federal rule with the exception that the federal provision "(or in the case of hearsay exception under subdivision (b)(2), (3) or (4), his attendance or testimony)" is stricken from (a)(5). The result is that an attempt to procure the declarant's testimony, such as by deposition or interrogatories, is not a precondition of the witness being deemed unavailable under subdivision (b)(2), (3) or (4). The requirement is considered to be a "needless, impractical and highly restrictive complication." Fed.R.Evid. 804, Report of Senate Committee on the Judiciary; *accord,* Me.R.Evid. 804(a)(5).

Considerations of practicality support the five specified instances of unavailability. Massachusetts case law has recognized several such instances, *see, e.g.,* Commonwealth v. DiPietro, 373 Mass. 369, 371–374, 367 N.E.2d 811 (1977) (and cases cited). *See also* Mass.R.Crim.P. 35(g). It should be noted that unavailability by reason of lack of memory, (instance (3)) "must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination." Fed.R.Evid. 804(a)(3), Adv.Comm.Note. Unavailability by reason of physical illness will generally require a showing that the witness "is so ill as to be unable to travel." Commonwealth v. DiPietro, supra at 373, 367 N.E.2d 811 (citing Vigoda v. Barton, 348 Mass. 478, 486, 204 N.E.2d 441 (1965)).

(b) This subdivision specifies the exceptions which require unavailability of the declarant as a precondition to admissibility.

Exception (1). This is the federal rule. It is in accord with Massachusetts law. Commonwealth v. DiPietro, supra, 373 Mass. at 371–374, 367 N.E.2d 811; Commonwealth v. Canon, 373 Mass. 494, 498, 368 N.E.2d 1181 (1977).

Exception (2). This is the federal rule with the addition of the language "or for unlawful procurement of an abortion" to conform the rule to G.L. c. 233, § 64. This exception changes Massachusetts law which requires that the declarant be unavailable by reason of death. G.L. c. 233, § 64, *e.g.,* Commonwealth v. Nolin, 373 Mass. 45, 50, 364 N.E.2d 1224 (1977). Although the federal rule substantially expands the rule at common law by permitting such statements in civil matters, it alters Massachusetts law in this respect only as to the expanded definition of unavailability, subdivision (a), as such statements, in the instance of death, are potentially admissible as a declaration of a deceased person under G.L. c. 233, § 65.

Exception (3). This is the federal rule. The Supreme Judicial Court held in Commonwealth v. Carr, 373 Mass. 617, 369 N.E.2d 970 (1977), that this exception is to be followed in substance pending any action that the court may take in response to the recommendation of the Advisory Committee. *Id.* at 623–624. The Committee recommends the adoption of this exception. The formulation changes the common law and Massachusetts law, as it existed prior to *Commonwealth v. Carr, supra,* by recognizing declarations against penal interest. The rule appropriately incorporates a corroboration requirement when the statement is "offered to exculpate" an accused.

Exception (4). This exception is a reasonable extension of proof of personal and family history by means of reputation under Butrick v. Tilton, 155 Mass. 461, 29 N.E. 1088 (1892) and Rule 803(19), and of pedigree by declarations of deceased family members under Haddock v. B & M Ry. Co., 3 Allen (85 Mass.) 298 (1862). As a practical matter, a person is frequently without personal knowledge of his personal or family history, for example, one's own date of birth or the fact of marriage of one's parents. Accordingly, under (A) a declarant's personal knowledge of the matter stated is not required. Statements concerning the personal or family history of another are admissible under (B), not only when made by a family member, but also when the declarant is so "intimately associated" that his information is likely to be accurate.

Exception (5). Federal exception (5) is not adopted. It is identical to federal exception Rule 803(24). It is not adopted for substantially the same reasons that Rule 803(24) was rejected, with the added consideration that G.L. c. 233, § 65, as respects hearsay, is available and incorporated here as exception (5). It should be noted that in incorporating G.L. c. 233, § 65, this exception is specifically limited to the instance of unavailability by reason of death.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the

RULE 16 CERTIFICATION

I, Thomas J. Carey, Jr., hereby certify that this Brief complies with the rules of court that pertain to the filing of Amicus briefs.

_____
Thomas J. Carey, Jr.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 12624

BRIEF OF AMICUS CURIAE MARK S. BRODIN AND NICKOLAS I. MERRILL